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No. 86-1909

In the Supreme Court of the United States

OCTOBER TERM, 1987

DAVID MERVIN HOFFMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the terms of a pretrial agreement precluded the district court from directing petitioner to testify before a grand jury.

2. Whether petitioner may assert his Fifth Amendment privilege, despite a grant of use immunity, and refuse to testify before a federal grand jury on the theory that his testimony might eventually be used in a foreign prosecution.

3. Whether incarceration for civil contempt interrupts the running of the term of imprisonment petitioner is serving.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is unreported. The order of the district court (Pet. App. B) is also unreported.

JURISDICTION

The judgment of the court of appeals affirming the district court order holding petitioner in civil contempt was entered on February 27, 1987. The petition for a writ of certiorari was filed on May 1, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On January 26, 1987, the United States District Court for the District of Montana issued an order, pursuant to 28 U.S.C. 1826, holding petitioner in civil contempt for failing to testify before a grand jury and directing that he be incarcerated until he did so (Pet. App. B). The court of appeals affirmed (Pet. App. A).

1. On January 22, 1986, petitioner, a Canadian citizen, was indicted in the United States District Court for the District of Montana for possession of 8,500 pounds of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Pet. App. C). On April 4, 1986, petitioner appeared before the district court to enter a plea of guilty to the charge, pursuant to a pretrial agreement with the prosecutor. Addressing the plea agreement, the trial judge conducted the following inquiry (Pet. App. G):

> The Court: And has there been any plea bargaining in this case, Mr. Thimsen [the defense counsel], with the U.S. Attorney's Office?
>
> Mr. Thimsen: Your Honor, the only plea bargain we have entered into is in exchange for the plea of guilty, the U.S. Attorney would not make any recommendation regarding sentencing, and that they will request a presentence report before [sentencing].
>
> The Court: All right. Is that your understanding, Mr. Seykora [the prosecutor]?
>
> Mr. Seykora: That's correct. I think one additional matter, perhaps in the event that [petitioner] were to make application, if he were sentenced to prison in this case, to serve his time in a Canadian prison, the U.S. Attorney's of-

> fice would not object to that, [petitioner] going back to Canada to serve that time, Your Honor, in addition to what Mr. Thimsen has already indicated to the Court.
>
> The Court: Is that your understanding, as well, Mr. Thimsen?
>
> Mr. Thimsen: Yes, Your Honor. The understanding, or the hope is, that any time Canada would give would be concurrent with the sentence here. Of course, that would be up to them. At least that recommendation would be put on the record, or a notation of it at least would be placed on the record.

After accepting petitioner's guilty plea, the district court sentenced petitioner to 15 years' imprisonment and to a three-year special parole term. The court also recommended that petitioner be permitted to serve his sentence in a Canadian prison. Pet. App. F.

2. Thereafter, a grand jury in the District of Montana issued a writ of habeas corpus ad testificandum requiring petitioner to appear as a witness before it on June 16, 1986. Petitioner refused to appear on the ground that his testimony could incriminate him in a pending Canadian prosecution. The United States Attorney then contacted Canadian authorities and, on November 18, 1986, a representative of the Attorney General of Canada appeared before the district judge who was supervising the grand jury investigation. The Canadian official presented a letter to the court stating that the Dominion of Canada did not intend to use petitioner's testimony before the grand jury in any prosecution of petitioner in Canada. The Canadian official also explained that the immunity letter was binding on all provinces of Canada, because all narcotics violations in Canada

fall within the jurisdiction of federal prosecutors. The district court thereupon issued a compulsion order requiring petitioner to testify and granting him immunity from the use in a criminal prosecution of matters revealed in his testimony. Pet. App. B.

Despite the district court's immunity order, petitioner persisted in his refusal to testify. The government accordingly requested that he be held in contempt. During the proceedings on the motion to hold petitioner in contempt, petitioner's counsel introduced a handwritten note made by his former defense attorney during plea negotiations. The note indicated that in exchange for a plea of guilty, the prosecutor had offered to make no recommendation with respect to sentence and to seek a term concurrent with any imposed for a then pending Canadian prosecution for an unrelated offense; it also indicated that if, in addition, petitioner agreed to testify against others, the government would recommend leniency in sentencing (Pet. App. D). Petitioner testified in the contempt hearing that he understood that, under the plea agreement, he had an option: "[He] could testify against others and [his] sentence would be reduced. If [he] didn't want to testify against others, [he could] take [his] chances in court. [He] chose the latter and received the maximum sentence" (Pet. App. H).

Following the hearing, the district court issued an order, pursuant to 28 U.S.C. 1826, holding petitioner in civil contempt and directing that he be incarcerated in the local jail until he testified or until further order of the court (Pet. App. B.) The court noted that "the plea bargain agreement of [petitioner was] set forth entirely upon the record" and that there was no just cause shown why he should

not testify before the grand jury (*ibid.*). The court further noted that "[t]he government has advised the court that it will not use the grand jury transcript for the purpose of providing it to Canadian authorities for prosecution of [petitioner] in Canada" (*ibid.*).[1] The order left it to the Bureau of Prisons to determine how incarceration pursuant to the contempt order would affect the term of imprisonment petitioner was then serving (*ibid.*).

3. On appeal, petitioner maintained that the order directing him to testify was contrary to the terms of his plea bargain with the government; that the prospect of his being further prosecuted in Canada for offenses relating to the subject matter of his grand jury testimony precluded the court from ordering him to testify; and that his incarceration for civil contempt could not lawfully interrupt the running of his criminal sentence, which was imposed earlier. The court of appeals rejected each of those claims. It held (Pet. App. A) that the government never promised petitioner that he would not be subpoenaed to testify; that the possibility of the use of grand jury testimony by a foreign jurisdiction does not justify a witness in invoking his privilege against compulsory self-incrimination despite a court order of use immunity;[2] and that a civil contempt sentence im-

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[1] At the hearing the court had directed that, in the event petitioner elected to testify, "[the] grand jury testimony is to be sealed. If it's transcribed, it's not to be released by [the prosecutor] to the Canadian government" (C.A. Supp. E.R. 40-41).

[2] In reaching this conclusion, the court relied on circuit precedent (*In re Federal Grand Jury Witness (Lemieux)*, 597 F.2d 1166, 1167 (9th Cir. 1979); *In re Weir*, 495 F.2d 879, 881 (9th Cir.), cert. denied, 419 U.S. 1038 (1974)), holding that in light of the district court's power to preserve the

posed upon a person serving a term of imprisonment properly suspends the service of the criminal sentence during the period of the contemnor's confinement for the contempt.

ARGUMENT

1. Petitioner contends (Pet. 10-16) that the order directing him to appear and testify before the grand jury violated the terms of his plea agreement. This fact-specific claim was properly rejected by the court below. There is no need for further review by this Court.

As this Court explained in *Blackledge* v. *Allison*, 431 U.S. 63, 73-74 (1977), "representations of the defendant [and] his lawyer * * * at [a guilty plea] hearing * * * constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity." In this case, during the Fed. R. Crim. P. 11 inquiry, petitioner's attorney represented to the court that the *only* promise the government made in exchange for petitioner's plea was its assurance that it would make no recommendation as to sentence and that it would recommend that petitioner be permitted to serve in Canada any sentence of confinement (Pet. App. G).

Representations made during the Rule 11 inquiry are "not invariably insurmountable," and in some cases "specific factual allegations" may entitle a defendant to an opportunity to show in a subsequent hearing that there were unrevealed promises made

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secrecy of grand jury testimony, there was no "real and substantial" danger of the foreign use of immunized grand jury testimony. See *Zicarelli* v. *New Jersey State Investigation Comm'n*, 406 U.S. 473, 478 (1972).

by the government in exchange for a plea of guilty. See *Blackledge*, 431 U.S. at 74-76. In this case, however, petitioner plainly failed to make the showing necessary to warrant an inquiry into the allegation that there was an unrevealed promise.[3] Although there was evidence that, during the plea bargaining process, the government had offered to seek leniency for petitioner if he agreed voluntarily to present testimony against others, it is undisputed that he elected not to do so. And, as the court of appeals recognized, nothing in the record suggests that, during the bargaining process, the government either promised petitioner that he would not be subpoenaed to testify in the event that he entered a plea of guilty, or that it made representations that could reasonably be understood as constituting such a promise. See, *e.g.*, *United States* v. *Kamer*, 781 F.2d 1380, 1387-1389 (9th Cir. 1986), cert. denied, No. 85-1923 (Oct. 6, 1986). Consequently, the plea agreement did not preclude the government from subpoenaing petitioner to testify during the grand jury proceeding.[4]

2. Petitioner also claims (Pet. 16-25) that, despite the grant of use immunity, his compelled testimony

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[3] Petitioner was, of course, given the opportunity to establish his claims regarding the plea agreement at the contempt hearing.

[4] *Santobello* v. *New York*, 404 U.S. 257 (1971), upon which petitioner relies is, therefore, inapposite. In that case it was undisputed that the defendant and the prosecutor had struck a bargain involving the entry of a plea of guilty to a lesser offense in exchange for the prosecutor's promise not to make any recommendation on sentence. In this case, no agreement was ever struck whereby, in exchange for petitioner's plea and promise to testify, the government agreed not to subpoena him to testify before the grand jury. At most, the government merely offered to make such an agreement.

before the grand jury would violate his Fifth Amendment privilege against compulsory self-incrimination because that testimony might be given to the Canadian government for use against him in a criminal prosecution in that country. This claim was also properly rejected by the court below.

As this Court explained in *Zicarelli* v. *New Jersey Investigation Comm'n*, 406 U.S. 472, 478 (1972), it is unnecessary to address the question whether the Fifth Amendment protects against the risk of the use of compelled testimony against the witness in a foreign prosecution unless there is a "real and substantial fear" of such use in a foreign prosecution. This is because "[i]t is well established that the privilege protects against real dangers, not remote and speculative possibilities" (*ibid.*). See, *e.g.*, *United States* v. *(Under Seal)*, 794 F.2d 920, 923 (4th Cir. 1986), cert. denied *sub nom. Araneta* v. *United States*, No. 86-172 (Oct. 16, 1986) [hereinafter *Araneta*]; *In re Grand Jury Proceedings*, 748 F.2d 100, 103 (2d Cir. 1984).

In this case, petitioner did not run a real and substantial risk of a foreign prosecution in which his grand jury testimony would be used against him. In the first place, a representative of the Attorney General of Canada furnished written assurance to the court that petitioner's grand jury testimony would not be used in any prosecution of petitioner anywhere in that country.[5] Beyond this, during the contempt hearing the district court specifically directed that "no one ever * * * release" petitioner's grand jury testimony "to anyone" and, specifically, that the prosecutor not release it to the Canadian government

[5] In light of that letter, petitioner's apparent concerns about the district court's interference with Canadian sovereignty (Pet. 21-23) are without foundation.

(C.A. Supp. E.R. 40-41). These assurances minimized the risk that, should petitioner decide to testify, his testimony would later be used to incriminate him in a Canadian prosecution. See, *e.g.*, *In re Grand Jury Proceedings*, 748 F.2d at 103 (protective order issued by the district court sufficient to protect against foreign prosecution); *In re Baird*, 668 F.2d 432, 433 (8th Cir.), cert. denied, 456 U.S. 982 (1982) (secrecy afforded grand jury proceedings by Fed. R. Crim. P. 6(e) adequately assured that incriminating testimony would not be furnished to foreign officials); *In re Federal Grand Jury Witness (Lemieux)*, 597 F.2d 1166, 1167 (9th Cir. 1979) (same).[6]

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[6] The decision of the court below and its earlier decision in *Lemieux*, *supra*, do not conflict with *Araneta*, *supra*, as petitioner maintains (Pet. 20). Both *Lemieux*, 597 F.2d at 1167, and *Araneta*, 794 F.2d at 923, hold that the proper framework for resolving the secrecy issue is the test articulated in *Zicarelli*, *supra*, *i.e.*, whether the witness confronts a real and substantial risk of foreign prosecution based on his immunized testimony. Although the court in *Araneta* concluded that the district court's protective order, issued pursuant to Fed. R. Crim. P. 6(e), was inadequate to obviate the risk of self-incrimination in a trial by a foreign state, it did so because of the unique circumstances of the case, which involved the former president of the Philippines, who was alleged to have illicitly obtained billions of dollars as a result of his activities in that country. The instant case does not possess the same notoriety. Moreover, by contrast with *Araneta*, petitioner was afforded written assurances by the foreign sovereign that his grand jury testimony would not be used against him in any foreign prosecution.

Although three Justices would have granted certiorari in *Araneta*, the court of appeals there concluded that there *was* a real and substantial risk of foreign prosecution and accordingly reached the question reserved in *Zicarelli*, *supra*. The court below, in contrast, concluded that there was *no* such risk (see note 2, *supra*); it accordingly did not consider

3. Finally, petitioner claims (Pet. 26-29) that the district court erred in directing that any incarceration resulting from his contempt citation would suspend service of the sentence on his earlier criminal conviction. More specifically, he maintains that such a suspension of the running of his term of confinement would contravene 18 U.S.C. 3568. That statute provides in pertinent part that

> [t]he sentence of imprisonment of any person shall commence to run from the date on which such person is received at the penitentiary * * * for service of such sentence. The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed. As used in this section, the term 'offense' means any criminal offense * * *.
>
> * * * * *
>
> No sentence shall prescribe any other method of computing the term.

The district court did not, itself, direct that the contempt incarceration would toll the running of the sentence imposed on the earlier criminal conviction. Instead, it merely stated that the effect upon the sentence of the time spent in custody pursuant to the contempt order "shall be comput[ed] by the Bureau of Prisons" (Pet. App. B). Bureau of Prisons regulations provide that "[i]f an inmate is serving a federal criminal sentence when a civil contempt sentence is ordered, the criminal sentence is suspended

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the scope of the Fifth Amendment privilege in this context. For that reason, this case is a less attractive candidate for certiorari than *Araneta*.

for the duration of the civil contempt sentence and time spent serving the contempt sentence is inoperative on any sentence being served" (28 C.F.R. 522.11 (d); Bureau of Prisons Program Statement No. 5140.11 (1979)).

The Bureau of Prisons' policy does not conflict with 18 U.S.C. 3568. As the court explained in *Martin* v. *United States*, 517 F.2d 906, 909 (8th Cir.), cert. denied, 423 U.S. 856 (1975) (quoting *Anglin* v. *Johnson*, 504 F.2d 1165, 1167 (7th Cir. 1974), cert. denied, 420 U.S. 962 (1975)):

> "[t]he language of section 3568 is unambiguous. Credit shall be given for time spent 'in connection with the offense or acts for which sentence was imposed' and 'offense' is defined as a 'criminal offense.' The confinement for which petitioner seeks credit was imposed in connection with a civil contempt (refusal to testify) and not in connection with the criminal offense 'for which sentence was imposed.'" * * *
>
> [Accordingly,] interruption of the criminal sentence by a civil confinement pursuant to [28 U.S.C.] § 1826(a) is not in derogation of 18 U.S.C. § 3568 but arises from the clear and unambiguous provisions of that statute.

Adopting reasoning similar to that in *Martin*, *supra*, and *Anglin*, *supra*, six other courts of appeals have likewise held that a period of incarceration for civil contempt interrupts a criminal sentence currently being served, and no circuit has held otherwise. See, *e.g.*, *In re Application of the United States Sen. Permanent Subcomm. on Investigations*, 655 F.2d 1232, 1239 & n. 33 (D.C. Cir.) (collecting cases), cert. denied, 454 U.S. 1084 (1981); *United States* v. *Dien*, 598 F.2d 743, 744-745 & n.1 (2d

Cir. 1979); *In re Garmon*, 572 F.2d 1373, 1375-1376 (9th Cir. 1978); *In re Grand Jury Investigation (Appeal of Hartzell)*, 542 F.2d 166, 168-169 (3d Cir. 1976), cert. denied, 429 U.S. 1047 (1977); *In re Grand Jury Proceedings*, 532 F.2d 410, 411-412 (5th Cir.), cert. denied, 429 U.S. 924 (1976); *Williamson* v. *Saxbe*, 513 F.2d 1309 (6th Cir. 1975). That uniform rule is entirely consistent with the policy underlying civil contempt proceedings against recalcitrant witnesses. If a civil contempt order did not interrupt a criminal sentence, it would have no coercive effect against a witness who was already serving a sentence on other charges. Review by this Court is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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